



Bar Council response to the Ministry of Justice's consultation on Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals

Introduction

1. This is the response of the General Council of the Bar of England and Wales [‘the Bar Council’] to the Ministry of Justice [‘MoJ’] Consultation, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals*.
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society.
4. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

General Comments

5. The Bar Council has previously provided its detailed views on the proposals contained in Sir Rupert Jackson's *Review of Civil Litigation Costs: Supplemental Report Supplemental Report Fixed Recoverable Costs* [‘SR’]. The Bar Council's response to the SR can be found [here](#).
6. The Bar Council expressed considerable doubt about the case for extending a scheme for Fixed Recoverable Costs [‘FRC’] to cases of significant value, and concern that a “one size fits all approach” was inappropriate in the context of the very large number and diverse nature of civil legal disputes which would potentially fall within the scope of an extended scheme. These concerns are echoed in the responses we have received from the Specialist Bar Associations [‘SBA’]s

7. Although the Bar Council continues to hold the views set out in its previous response, those arguments will not be repeated here, instead we set out below some general observations, and then focus on the structure and details of the proposed scheme.

The need for adequate remuneration

8. At the risk of stating the obvious, if it is going to work properly, a FRC scheme needs to balance controlling costs overall with enabling professionals involved in disputes to be properly remunerated for the work they perform. If it does not control costs, it is difficult to see what useful function it is performing. But if it does not enable those performing the work to be properly remunerated, access to justice is undermined. Professionals will no longer be willing to be involved in such cases, or they will be left only for the less experienced or less able, or dealt with in a way in which efficiency is promoted over quality. The rates which are used are an important part of this, and we will comment further on these below.

Periodic Review and Updating

9. Appropriate mechanisms for regular reviewing and adjusting rates are essential to ensure that any FRC system retains public confidence. Such reviews must reflect inflation but also allow some facility to take into account evidence of the actual time and cost spent in litigating certain types of claim and adjusting FRC accordingly. Experience from the Fast Track regime reveals that, unless there is a proper system for review, inertia leads to rates remaining unchanged year after year, growing ever more unrealistic, and reducing confidence in the system.
10. Equally fundamental to the extended FRC proposal, as we understand it, are two concepts, namely (a) that fees charged as between client and his or her lawyer will (usually) fall into line with recoverable costs and (b) that fixing costs enables a degree of “swings and roundabouts” for the lawyers. The position of the Bar (and independent specialist advocates more generally) leads to one or two particular issues in that regard which we will discuss further below.

Counsel’s fees and “ring fencing”

11. The views expressed in paragraphs 8.11 - 8.13 of Chapter 3 of the Consultation Paper are noted. However, even on the fast track, the concept of a “trial advocacy fee” is retained. For Intermediate Cases, a number of the proposed ingredients are designated for “Counsel/ specialist lawyer”.
12. A problem which has been endemic with fast track trial fees has been the temptation to take advantage of the fixed nature of these fees to make a profit by requiring Counsel to agree a brief fee for appearing which is less than the fixed trial fee. This undermines the scheme in two ways. First, the logic of fixing a fee (for drafting a statement of case, or appearing at trial) at a particular level must be that this is

consistent with the proper remuneration for a specialist who has the experience and skill appropriate for a case of the relevant complexity. Any incentive to look for a “cheaper” option cannot be good for the client or the administration of justice. Second, even if one assumes that nothing of that type is happening, it defeats the principle of “swings and roundabouts” if Counsel is limited to the fixed fee if the case is at the upper end of the band, but then required to take something less if the case is slightly less complex (but within the same band).

13. Fortunately, the solution is straightforward and cannot have the effect of increasing costs recovery. Presumably it is intended that fees such as that for Counsel or a specialist lawyer drafting a statement of case will only be payable if Counsel or a specialist lawyer are instructed to draft a statement of case. The rules should make clear that that part of the FRC is only recoverable if and to the extent that it is confirmed that the client is obliged to pay at least that amount to Counsel or the specialist lawyer responsible for the drafting. The same provision should be made in respect of advocacy fees where the trial advocacy is done by Counsel or someone else not employed by the solicitor. This will remove any incentive to agree lower fees than those specified by the extended FRC regime, while leaving it entirely open to the market to dictate what fees are actually agreed and without increasing (on the contrary, potentially reducing) the overall recoverable fees.

The proposed fees

14. The Bar Council is concerned that the evidence which has been used to fix fees is far too limited. In circumstances where the fees have been extrapolated from examples of PI cases handled by one firm, it is essential to build in a process of review, with the first review fixed to begin no later than a year after implementation. Evidence should be sought about the correlation between work done and fees recovered on actual cases during that period. Further reviews should take place at least every 2 years, with automatic increases linked to the RPI in the intervening years.

Allocation

15. We will make some specific comments about the bands and their criteria under Q1 and Q3 below, but there are some general observations which might usefully be made at this stage. It is important to understand that, in many contexts (PI claims being the most obvious), the parties have very different motivations in relation to costs recovery. A defendant to a strong claim is likely to want the most limited costs recovery. A claimant (or at least his or her lawyer) is likely to want maximum costs recovery. That means that allocation may be controversial and the subject of submissions.
16. There are two key requirements that have the potential to conflict with one another. The first is that allocation is efficient: (1) if there are going to be disputes and submissions and hearings, the net effect will be to increase, rather than reduce, costs; and (2) everyone should know where they are at the earliest possible stage: lawyers

need to know what fees can be charged/ recovered in order to decide whether to take or continue to act on the case and how it should be managed.

17. The Bar Council agrees with Sir Rupert Jackson that issues of allocation should be a matter for the judge at case management. The rules governing allocation should not be too prescriptive, particularly as the introduction of a FRC to cases up to £ 100, 000 will be a significant innovation and it will take some time for the reforms to 'bed in'. How the system works should be subject to review and consultation after at least a year. Costs sanctions may have a role to play, but care must be taken to ensure that the costs penalties do not inhibit appropriate applications being made and cases being allocated fairly to the appropriate track or banded properly within track.

Safety Valve - Escapes

18. An essential feature of a robust scheme is a safety valve, to enable cases which do not fit, regardless of label, to be treated differently and thereby avoid bringing the whole scheme into disrepute. In particular when cases are complex and likely to be litigated at a cost inappropriate for the FRC there should be clear provisions allowing for 'escapes'. More is said about this in answer to the specific questions below.

Safety valve - Exceptions

19. One of the reasons that the fast track system has been relatively successful is that judges could remove cases from its ambit by allocating them to the multitrack. That prevented injustices and scenarios in which the nature of the case (regardless of the sum in issue) meant that the limitations of the fast track, whether in terms of procedure or trial fees, would not be appropriate. It is even more essential that the same power is available in the context of an extended FRC scheme. Otherwise, the whole scheme will be discredited by individual examples of cases where a good claim cannot be pursued because lawyers cannot make the business case for providing representation, or where an "ordinary" litigant is rolled over by an opponent with deep pockets and no concern about costs recovery.

THE BAR COUNCIL'S ANSWERS TO THE CONSULTATION QUESTIONS

The Fast Track

1. Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out? We seek your views, including any alternatives on:
 - (i) the proposals for allocation of cases to Bands (including package holiday sickness);
 - (ii) the proposals for multiple claims arising from the same cause of action;
 - (iii) whether, and how, the rules should be fortified to ensure that (a) unnecessary challenges are avoided, and (b) cases stay within the FRC regime where appropriate; and
 - (iv) Part 36 offers and unreasonable litigation conduct (including, but not limited to the proposals for an uplift on FRC (35% for the purposes of part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement.

Answers

- (i) **the proposals for allocation of cases to Bands (including package holiday sickness);**

Fraud/Dishonesty. In the context of personal injury litigation, the Bar Council agrees with PIBA that cases involving fundamental dishonesty and fraud properly fall to be allocated to Band 4.

Package Holiday Claims. The Bar Council defers to PIBA as the SBA with particular knowledge of package holiday claims. Band 3 would be appropriate unless there are specific issues of complexity of evidence or law which justify allocation to Band 2.

Banding Allocation. The Bar Council agrees that judges must retain the discretion to allocate cases; that the rules relating to allocation should not be unduly prescriptive, and that proportionality would be a key factor. The Bar Council is concerned that a costs penalty of £ 150 on the Fast Track may have a deterrent effect that could be unfair, and such a power should be exercised with care. A broad discretion with the sanction of the £ 150 penalty would be appropriate.

Counsel's Fees. Provision for Counsel's fees is a particular concern of the Bar Council and of PIBA in particular as many fast track cases are PI. The Bar Council welcomes the specific provision at §8.12 for fees for 'counsel or specialist lawyers' for post-issue advice or conference and settling defence or counter-claim in Band 4 and NIHL claims. The Bar Council recognises and agrees with PIBA's observation that counsel are regularly instructed in Fast Track cases which would currently fall outside Band 4 contrary to what is said at § 8.13 of the consultation, particularly in cases worth more than £ 10,000. The Bar Council supports PIBA's proposal that in addition to provision for "counsel or specialist lawyer' in Band 4 there should be an appropriately ring-fenced fee for an advice in cases worth over £ 10, 000. A fee of £ 750 for such advice would be appropriate.

(ii) the proposals for multiple claims arising from the same cause of action

The problem with a fixed uplift to reflect multiple claims arising from the same cause of action is that it implies some uniformity of duplicated costs when there can be considerable differences between individual claims arising from the same cause of action.

Claims in which there is limited additional work

The PNBA observe that in a professional negligence case relating to a property purchase, the claim might be by husband and wife as co-owners and additional work from there being 2 claimants will be minimal and a 10% uplift would be appropriate. Similarly, PIBA comment that in accident cases involving multiple victims, liability issues will be common between individual claimants and a 10% uplift may be appropriate.

Claims in which there is significant additional work

Both PNBA and PIBA make the point that in accident cases involving multiple injured victims, claimants will have separate injuries which will require additional work and cost on pleadings, expert evidence and witness statements in relation to quantum. PNBA suggests that the uplift should be greater than 10%, say 25%. The Bar Council agree that an uplift of 25% would be appropriate for drafting, advice, and advocacy work undertaken by Counsel prior to trial.

Trial Fees

A particular concern is in relation to trial fees. The Bar Council supports PIBA's recommendation that in relation to trial fees involving multiple claimants there should be an increase of 10% of the brief fee when there are multiple claimants in a trial on liability and an increase of 75% when the trial is in respect of quantum or liability and quantum and involves multiple claimants.

(iii) whether, and how, the rules should be fortified to ensure that (a) unnecessary challenges are avoided, and (b) cases stay within the FRC regime where appropriate

Whether or not cases remain within the FRC must be a matter for judicial discretion. Appropriate case management must include a power to allow cases to exit the FRC regime in appropriate circumstances.

Exiting the FRC should be exceptional, but the rules cannot be unduly prescriptive, particularly when this is a new regime which will require some time to 'bed-in'. It would be inappropriate to apply any rubric based on the value of the case as this would not necessarily reflect its complexity and could create injustice.

A test based on a criteria of 'exceptionality' may be counter-productive in that, if applied too strictly, it may give rise to appeals and satellite litigation.

Proportionality must be a particularly important factor, but the overall criterion must be to consider "all the circumstances of the case". The concern such a broad and non-prescriptive test could give rise to an unsupportable number of applications that would undermine the FRC regime may be misplaced. The Bar Council notes and agrees with the observations made by PIBA that the court is very experienced in dealing with issues involving allocation and this is not an issue which has hitherto caused a significant number of appeals or satellite litigation. The reality is that the party making such an application would only do so if it considered such an application had reasonable prospects of success: in a FRC regime costs-recovery is severely limited and additional costs are only going to be incurred if cost-effective.

The Bar Council agrees with other SBAs that such applications will also be discouraged by an appropriate fixed costs sanction applying in the event of an unsuccessful challenge. The Bar Council notes that both the PNBA and PIBA agree that the proposed costs penalty of £150 is too low, and consider that £500 would be more appropriate.

- (iv) **Part 36 offers and unreasonable litigation conduct (including, but not limited to the proposals for an uplift on FRC (35% for the purposes of part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement.**

A Fixed Percentage Uplift. The Bar Council agrees with other SBAs that fixed percentage uplifts for Part 36 offers is both appropriate and sensible. The rules must allow some discretion to the judge to disapply such a rule. Some thought has been given as to whether or not an unlimited discretion or banding would be appropriate, however, in a fixed costs regime where certainty is a key concern, a fixed percentage is appropriate.

The Appropriate Percentage. The Bar Council agrees with PIBA that a fixed percentage of 35% may be too low to act as a sufficient incentive to make and accept a reasonable Part 36 offer. Encouraging parties to settle litigation and ensuring that there is effective incentive to compromise is an essential part of the CPR. A fixed percentage of **50%** better reflects the importance of settlement to the process and is more likely to be an active driver of sensible behaviour.

Unreasonable Litigation Conduct. The Bar Council notes and agrees with those SBAs who consider that unreasonable conduct must be considered differently from the sanctions provided for under a revised Part 36 for FRC cases, and that in particular, a higher percentage would be appropriate. The Bar Council agrees with PIBA that there needs to be a broad discretion as poor conduct can come in a variety of forms and occasion prejudice and disruption to the court as well as the parties to litigation. A discretion to allow a percentage uplift capped at 100% of the appropriate FRC would be appropriate. The Bar Council considers that it would not be appropriate for an uplift to be more than 100% of the appropriate FRC: such costs are a sanction not a penalty.

Noise Induced Hearing Loss

2. Given the Government's intention to extend FRC to NIH cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:
- (i) the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response;
 - (ii) the contents of the proposed standard directions, and the listing of spate preliminary trials.

Answer

The Bar Council defers to PIBA as the relevant SBA for NIHL claims

'Intermediate' Cases

3. Given the Government's intention to extend FRC to intermediate cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:
- (i) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;
 - (ii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;
 - (iii) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done; and
 - (iv) whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.

Answers

- (i) **the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;**

The Extension of the Fast Track to Intermediate Cases

Neither the Bar Council nor the SBAs consulted support the proposed extension of the Fast Track to intermediate cases. The reasons for this include the following:

Complexity. Claims worth up to £100,000 and with sufficient complexity to merit up to a 3 day trial are very different from cases in the current fast track.

A new track. Sir Rupert Jackson did not propose an extension of the existing fast track. He proposed a new intermediate track with its own procedural rules and protocols.

Expert Evidence. The proposed intermediate track included that there be no more than 2 experts on each side. A case with a total of 4 experts is more suited to the Multi-Track. In order for an intermediate track to work appropriately the limit should be one expert per party: that this would cover the vast majority of cases.

Costs and Case Management. Sir Rupert Jackson's view is that costs budgeting is working well. There is no significant evidence that the current system is restricting access to justice or giving rise to disproportionate costs.

Alternatively, the case for a new intermediate track.

If FRC are to be introduced for intermediate cases, the Bar Council agrees with the SBAs consulted that a specific intermediate track is appropriate. There are proposed procedural changes that are specific to intermediate cases which are best reflected in a specific track; moreover, there is an additional benefit in the courts and court users developing expertise and familiarity with the particular issues that arise in relation to intermediate cases which properly reflects by having its own track, distinct from the current fast and multi-tracks.

(ii) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track

Trial Length. Trial length is perhaps the strongest indicator of the complexity of a claim. It needs to be clearly understood that a 3 day trial for an intermediate case must involve a full trial including lay and expert evidence, submissions and judgment. The Bar Council is sceptical that the issues that emerge at trial can be fully or properly anticipated at the CMC stage: moreover, the full consideration of the range of issues and experts may make CMC unduly contentious and prolonged. It may be difficult to conclude evidence, submissions, and judgment in 3 days if the court hears from 4 expert witnesses. The Bar Council agrees that intermediate cases, should they last more than 3 days, should be automatically excluded from FRC.

Expert Evidence. A major factor impacting upon both time and complexity is the role of expert evidence. The Bar Council is extremely concerned that the strict application of a three day time limit could lead to complex cases being placed in the FRC when it is inappropriate, or significant time pressures being applied at trial that could lead to unfairness. A sensible approach is to consider and limit the role of expert evidence. If expert evidence is likely to take more than one day, allocation to the multi-track would be appropriate: in many case this may mean that where there more than one expert on each side, allocation to the multi-track would be appropriate. The Bar Council would advise against any rule or prescription that the number of experts in itself should determine allocation.

Escapes. The proposed FRC regime involves a significant change to civil litigation. The scheme will cover a huge variety of cases. A rule that allows claims to exit the FRC regime only in 'exceptional circumstances' would be unduly restrictive and give rise to unfairness and inevitable satellite litigation. To an extent the parties and the courts will be on a learning process together and over time it will become clear which cases, rules, and issues give rise to particular problems: it is for this reason that a fundamental review will be required in due course. However, in the meantime, the Bar Council's view is that it would not be appropriate to create an unduly high hurdle for allowing claims to exit the FRC. The judge should have a broad discretion to take all the circumstances of the case into account.

Exceptions. The consultation recognises that some cases are not appropriate for FRC. SBAs are in a better position than the Bar Council to identify those cases which are exceptional as they are by their nature particular to specific areas of practice, for example:

- PIBA identifies categories of claim involving chronic pain, and notes the particular practical problems that may arise in allocating personal injury claims when the value of the claim cannot be known until a comparatively late stage;
- The Bar Human Rights Committee Chair drew the Bar Council's attention to Equality and Human Rights Act claims in the county court and how these claims, although of limited financial value, can involve highly complex issues reflected in the pleadings, complicated disclosure exercises, and specialist legal advice.

- Cases involving allegations of fraud or dishonesty in a professional or commercial context should always be allocated to the multi-track.
- Multi-party litigation, in particular when there is more than one defence and/or counterclaim, would usually be appropriate for the multi-track
- The Chancery Bar Association sets out those cases it considers unsuitable for FRC, including cases involving experts in different disciplines would not be suitable for the intermediate track: for example property and building disputes involving surveyors, architects, and valuers.
- In its response the Property Bar Association is sceptical that the parties will be able to find appropriate representation at the level of fees set out in the Consultation. This creates a significant issue in relation to equality of arms when large institutions may be able to pay over the fixed rate but individuals and SMEs would be unable to meet the shortfall. The Bar Council's view of that submission, is that property litigation of this kind is not appropriate for FRC.

The Bar Council has not seen all SBAs' response to this consultation. The list of categories of case that should be excluded from FRC is potentially large in number, but may in reality reflect a small volume of cases overall. A system that recognises the categories of cases that are appropriate exceptions at an early stage is very likely to save time and money in the long term, avoiding unnecessary satellite litigation and appeals.

An early review to identify those cases which may be inappropriate for FRC is essential to ensure that the scheme does not restrict access to justice.

Level of Fees

An inevitable problem with this consultation is that the huge range of cases that will now fall within the proposed FRC regime cover a variety of specialist work. There are cases where the range of fees proposed are within the range of what may be 'manageable' but there are other cases in which the current level of fees are simply inappropriate: see for example the response of the Property Bar Association.

Part of the answer to this issue is, as discussed above, to exclude those cases where the level of fees simply does not reflect the commercial reality. These cases can properly be considered as exceptions; so, for

example, complex personal injury claims and clinical negligence claims are also noted to be unsuitable for FRC.

(iii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation

The Bar Council considers that allocation should be determined by a judge having regard to all the circumstances of the case. A list of factors, including value and complexity, should be considered but all cases are different and cannot be reduced to a tick-box exercise. In particular, while the length of trial, the number of experts, and the value of the claim will be significant, if not the most important aspects that should be taken into account, there are other matters that should be considered, such as the importance of the issues to the parties themselves.

The Bar Council is concerned that any new rules that are unduly prescriptive will undermine rather than build upon the experience the courts already have of allocating cases within the current rules. The Bar Council's view is that as the issue of allocation is a decision for the judge on case management, the judge can be relied upon to decide the issue appropriately as has been the case hitherto. The judge can be trusted to allocate cases properly having regard to new rules in relation to intermediate cases based on knowledge and experience of current practice.

The Bar Council considers that a financial penalty is only appropriate when applications have no merit or represent 'gamesmanship'. If a "penalty" is introduced to discourage such applications there should be a broad judicial discretion for it to be disapplied in the circumstances of the case.

(iv) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done

Bands 2 and 3

The Bar Council notes that both PIBA and the PNBA advocate three rather than four bands, and that consideration should be given for bands 2 and 3 to be combined. It seems logical that removing one band will reduce the possibility of dispute and remove additional complexity. Three bands may in rather broad terms properly accommodate complex

claims at the highest band, simple claims which will be allocated to the lowest, and a middle band which will effectively deal with those cases fall in between. However, the Bar Council notes that the current proposals allow for four bands and acknowledges that this matter has been carefully considered by both the MoJ and Sir Rupert Jackson. The provision of 4 bands allows for greater precision and care to be taken when considering allocation within bands which the Bar Council considers would be welcome, particularly in the context of the judiciary administering new procedural rules for claims of significant value to the parties involved. A system that encourages specific consideration to these issues at an early stage of the process is probably of considerable value.

Band 4

Band 4 should be reserved for substantial and complex cases. Allocation should have regard to a broad range of factors. Issues of fraud and dishonesty have already been mentioned. Claims involving multiple parties may also be appropriate cases for Band 4. The value of the claim must be a key but not a decisive factor. Legal and factual complexity are very often contentious and may not be determinative: a case can be simple and straightforward to one party but complex and difficult to another. In most cases the decisions made at the CMC will be determinative, in particularly having regard to the issues in the case, the extent of disclosure, the nature of the lay witness evidence and the role of experts. The rules should not be too prescriptive but give the judge a wide discretion.

- (v) **whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.**

This question has been addressed at several points in the Bar Council's earlier answers: the rules should not be too prescriptive and the judge should have a wide discretion to take into account all the circumstances of the case in determining the suitable band.

Judicial Review

4. Do you agree with the proposal for costs budgeting in JRs with a criterion of “whether the costs of a party are likely to exceed £ 100,000”? If not, what alternative do you propose?

Answer

The Administrative Law Bar Association [‘ALBA’] is responding to this part of the consultation.

The Next Steps

5. We seek your views in the proposals in this report otherwise not covered in the previous questions throughout the document.

Answers

Expedited Procedure

The proposal to introduce expedited procedure in all claims with damages between £ 25, 000 to £ 100, 000 is a hugely significant change in civil litigation and requires much further consideration than is given to it in this Consultation. In particular, the consultation has no apparent answer to the question of what the parties or the court will do when the evidence in the case develops so that the limitations placed upon the length of pleadings and witness statements or the limitations on disclosure no longer apply. These changes represent not only a cultural change in the way in which cases are litigated, but place new and untested restrictions on the parties’ conduct of litigation. Such changes have also to be considered in the particular context of a new approach in which interlocutory applications are “discouraged”.

The Bar Council is concerned about the proposal for “streamlining” the procedure in a wide range of cases, by imposing page limits on statements of case and witness evidence, together with limiting disclosure in non-PI cases to documents relied upon by each party. Page limits are a very blunt implement for reducing the amount of work which needs to be done. It can require more work in order to achieve greater brevity. In any event, the mischief if cases are run at minimum is more likely to be a failure to engage properly with the issues; generic pleadings which consist of broadly worded allegations or unparticularised denials, such that the real dispute does not become clear until trial. Similarly, disclosure is a difficult area which is currently the subject of an important pilot scheme. It is questionable whether it is a good idea to make sweeping changes to the procedural landscape for a huge number of cases as an afterthought to a FRC regime.

Abated Trial Fees

The number of trials being adjourned at short notice has increased dramatically. This has particular impact on the personal injury bar and PIBA and its members have recently drawn this to the attention of the Bar Council who share their concerns. Both the current and proposed FRC regimes do not provide any safeguard to provide for the payment of advocacy fees when cases are adjourned either at court or shortly before the trial date. The Bar Council supports' PIBA's proposal that in circumstances when a trial is removed from the list with less than 48 hours' notice, the advocate's fee for the adjourned trial should be payable *inter partes* at 100% if the matter does not proceed on the day of the trial, and 75% if it is removed from the list within 48 hrs of the day listed for trial.

Litigants in person

The PNBA makes an important point in relation to litigants in person. The costs set out in the grids assume that parties will be represented by solicitors. Consideration has to be given to claims being by litigants in person, including those using direct access who may instruct counsel either for specific pieces of work, such as drafting pleadings, or for trial. This issue must be specifically addressed in the rules. Consideration should be given to whether a Litigant in Person's costs should be fixed and at what level.

The Bar Council does not respond to Questions 6-10

Bar Council¹

06 June 2019

For further information please contact

Emily Timcke

Young Bar and Employed Bar Policy and Programme Manager

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Direct line: 020 7092 6802

Email: etimcke@barcouncil.org.uk

¹ Prepared for the Bar Council by the Fixed Fees Working Group.